Filed 3/20/19 Wells Fargo Bank, Nat. Assn. v. Pope CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

WELLS FARGO BANK, NATIONAL ASSOCIATION, Plaintiff and Respondent, v. JAMES POPE et al., Defendants and Appellants.	A150082 (San Francisco County Super. Ct. No. CGC-12-522767)

Defendants James Pope and Pope & Pope Properties, LLC appeal the trial court's order granting summary judgment in favor of plaintiff Wells Fargo Bank, National Association (Bank). Defendants guaranteed a business line of credit extended to Folsom Project, LLC (Folsom). The line of credit was also secured by real and personal property owned by Folsom. Folsom defaulted, and the Bank obtained a deficiency judgment against defendants following a nonjudicial foreclosure of a deed of trust. Among other things, the trial court concluded the "one-form-of-action" rule under Code of Civil Procedure section 726, subdivision (a)[1] did not bar further collection on defendants' loan guaranties. We affirm.

[1] Code of Civil Procedure section 726, subdivision (a) provides: "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property or an estate for years therein, which action shall be in accordance with the provisions of this chapter. In the action the court may, by its judgment, direct the sale of the encumbered real property or estate for years therein (or so much of the real property or estate for years as may be necessary), and the application of

FACTUAL AND PROCEDURAL BACKGROUND

The parties agree there are no material factual disputes and that this case turns on issues of law and on the undisputed terms of the relevant loan-related documents.

On September 17, 2007, Peninsula Bank of Commerce (the Bank's predecessor in interest) extended a business line of credit in the amount of $4.75 million (Loan) to Folsom to fund the construction remodel of an existing building located on 24th Street in San Francisco. The Loan was evidenced by a promissory note and a construction loan agreement, and was secured by a deed of trust against the subject property, which was owned by Folsom.

Wildwood Investments International, Inc. and defendant Pope & Pope Properties, LLC were the members of Folsom. Defendant Pope was the sole owner and shareholder of Pope & Pope Properties, LLC. Defendants each executed documents guarantying full payment and satisfaction of the Loan.[2] Under the terms of the guaranties, defendants waived "all rights and defenses that Guarantor may have because Borrower's obligation is secured by real property. . . . These rights and defenses include, but are not limited to, any rights and defenses based upon Section 580a, 580b, 580d, or 726 of the Code of Civil Procedure."

On August 27, 2010, a notice of Folsom's default was recorded.

On April 29, 2011, a notice of trustee's sale was recorded.

---

the proceeds of the sale to the payment of the costs of court, the expenses of levy and sale, and the amount due plaintiff, including, where the mortgage provides for the payment of attorney's fees, the sum for attorney's fees as the court shall find reasonable, not exceeding the amount named in the mortgage." All further statutory references are to the Code of Civil Procedure except as otherwise designated.

[2] "A guarantor is one who promises to answer for the debt or perform the obligation of another when the person fails to pay or perform." (*Gramercy Investment Trust v. Lakemont Homes Nevada, Inc.* (2011) 198 Cal.App.4th 903, 911 (*Gramercy*); see Civ. Code, § 2787.)

On June 5, 2011, a trustee's deed upon sale was recorded, showing the property was purchased by the Bank for $1,012,000.

On April 25, 2012, the Bank's counsel sent a letter to defendants demanding payment of the deficiency of $1,411,112 that remained due after foreclosure.

On July 27, 2012, the Bank filed a verified complaint for breach of contract, seeking a deficiency judgment against defendants under their personal guaranties of the Loan. Defendants filed their answer on January 22, 2013.

On February 25, 2014, defendants filed a first amended cross-complaint against the Bank, including a cause of action for declaratory relief as to their liability under the personal guaranties.

Thereafter, the Bank moved for summary judgment as to its complaint and defendants' cross-complaint. In their opposition and countermotion for summary judgment, defendants conceded they had "absolutely and unconditionally" guaranteed the loan. They argued they had a complete defense based on the one-form-of-action rule codified in section 726, subdivision (a), asserting the Bank's nonjudicial foreclosure barred any deficiency judgment.

The trial court granted the Bank's motion as to both the complaint and cross-complaint, and entered judgment in the amount of $2,326,649.50, including $1,411,112.58 in principal and $891,171.40 in interest. In granting summary judgment, the court reasoned that guaranties are independent contracts that are enforceable on their own terms, and found that defendants' guaranties were excluded from the obligations secured by the deed of trust. The court also found defendants had executed waivers of statutory antideficiency protections as contemplated by Civil Code section 2856.[3] This appeal followed.

---

[3] "Civil Code section 2856 provides that any guarantor or other surety, including a guarantor of a note secured by real property, may waive rights and defenses that would otherwise be available to the guarantor, including antideficiency protections provided by

DISCUSSION

I. Standard of Review

The standard of review on appeal from a summary judgment is de novo. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860 (*Aguilar*); *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 334.) In general, summary judgment "shall be granted if . . . there is no triable issue as to any material fact. . . . In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers . . . and all inferences reasonably deducible from the evidence, . . . [unless] contradicted by other inferences or evidence that raise a triable issue as to any material fact." (§ 437c, subd. (c).)

The moving party bears the burden of showing, to a degree equal to the standard of proof at trial, that there is no issue of material fact on any cause of action; if the moving party succeeds, then the opposing party bears the burden of presenting competent evidence raising an issue of material fact. (*Aguilar*, *supra*, 25 Cal.4th at p. 845; see § 437c, subd. (p)(2).) Here, defendants do not challenge the trial court's finding that the Bank shifted its burden.

II. Defendants' Guaranties Were Not Secured by the Deed of Trust

"A lender is entitled to judgment on a breach of guaranty claim based upon undisputed evidence that (1) there is a valid guaranty, (2) the borrower has defaulted, and (3) the guarantor failed to perform under the guaranty." (*Gray1 CPB, LLC v. Kolokotronis* (2011) 202 Cal.App.4th 480, 486 (*Gray1 CPB*).)

Defendants do not challenge the sufficiency of the elements supporting the Bank's complaint for breach of guaranty and they concede that no triable issues of fact exist on

---

Code of Civil Procedure sections 580a and 726. The statute was enacted in response to the holding of *Cathay Bank v. Lee* (1993) 14 Cal.App.4th 1533 . . ., which imposed stringent requirements on the wording and interpretation of a guarantor's waiver of a defense arising from the principal's rights under the antideficiency statutes." (*Gramercy*, *supra*, 198 Cal.App.4th at p. 911.)

summary judgment. Instead, they assert an affirmative defense that "Peninsula Bank expressly brought the Construction Loan Agreement and [defendants'] personal guaranties into the ambit of obligations secured by the Deed of Trust." Defendants argue the Bank is barred by antideficiency laws from enforcing the guaranties after it elected to proceed through a nonjudicial foreclosure of the subject property. The Bank disagrees, asserting the deed of trust secured the obligations of trustor Folsom only, not the guarantors. The Bank contends that defendants' reading of the relevant contractual documents contradicts the express language of the deed of trust and would vitiate the guaranties made by defendants as independently enforceable agreements; such outcome would be contrary to the parties' clear and express intent. We agree that defendants misinterpret the relevant contracts.

Under statutory rules of contract interpretation, a contract must be read to give effect to the mutual intention of the parties at the time it was made. (Civ. Code, § 1636.) Mutual intent is to be inferred, if possible, solely from the written provisions of the contract. (Civ. Code, § 1639.) The court's function is to ascertain what, in terms and substance, is contained in the contract, not to insert what has been omitted or to omit what has been inserted. (Code Civ. Proc., § 1858.) Applying these rules, we "look first to the language of the contract in order to ascertain its plain meaning or the meaning a layperson would ordinarily attach to it." (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 18.) If there is no ambiguity, the clear and explicit meaning controls. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608.)

With these principles in mind, we turn to the deed of trust and the related contractual documents to ascertain what obligations the parties mutually intended to secure under the deed of trust.

We first note that the deed of trust identifies the contractual parties as Folsom, as "Trustor," Peninsula Bank of Commerce, as "Lender" and "Beneficiary," and Greater Bay Bank N.A., as "Trustee." Neither defendant is a party to the deed of trust.

Defendant James Pope cosigned the deed of trust solely in his capacity as trustor and manager of the Folsom Project, LLC.

Under the following provision, the deed of trust expressly states what it secures:

> "This deed of trust, including the assignment of rents and the security interest in the rents and personal property, is given to secure (a) payment of the indebtedness and (b) performance of any and all obligations of the trustor under the note, the related documents, and this deed of trust. This deed of trust, including the assignment of rents and the security interest in the rents and personal property, is also given to secure any and all of trustor's obligations under that certain construction loan agreement between trustor and lender of even date herewith. Any event of default under the construction loan agreement, or any of the related documents referred to therein, shall also be an event of default under this deed of trust." (Capitalization altered.)

From the face of this security provision, the deed of trust is given to secure the *trustor's* indebtedness to the lender and the performance of any and all obligations *of the trustor*, including under the construction loan agreement. As explained above, the trustor is Folsom, not the defendants. Indeed, this security provision makes no mention of defendants or any guarantor.

Other contractual provisions support an interpretation that the deed of trust secured the trustor's obligations alone. Under "Payment and Performance," the deed of trust states: "Except as otherwise provided in this Deed of Trust, *Trustor* shall pay to Lender all amounts *secured by this Deed of Trust* as they become due, and shall strictly and in a timely manner perform all of *Trustor's* obligations under the Note, this Deed of Trust, and the Related Documents." (Italics added.) These provisions evince a clear

intent by the parties to secure the trustor's indebtedness to the lender and obligations to perform.

In seeking to be brought within the scope of the deed of trust, defendants rely on the sentence, "Any Event of Default under the Construction Loan Agreement, or any of the Related Documents *referred to therein*, shall also be an Event of Default under this Deed of Trust." (Italics added.) Defendants contend that the word "therein" incorporates the definition of "related documents" contained in the construction loan agreement between Folsom and the Lender. That definition in turn states: "The words 'Related Documents' mean all promissory notes, credit agreements, loan agreements, environmental agreements, *guaranties*, security agreements, mortgages, deeds of trust, security deeds, collateral mortgages, and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Loan." (Italics added.) Defendants argue their guaranties are encompassed within this definition of "related documents" and therefore default of a guaranty agreement constitutes "an event of default" under the deed of trust. On that basis they contend the deed of trust directly secured defendants' own guaranties. We are not persuaded.

The term "related documents" is also defined within the deed of trust itself. That definition states in relevant part: "The words 'Related Documents' means all promissory notes, credit agreements, loan agreements, . . . and all other instruments, agreements and documents, whether now or hereafter existing, executed in connection with the Indebtedness; *except that the words do not mean any guaranty* or environmental agreement . . . executed in connection with the indebtedness." (Italics added.) By its plain terms, the deed of trust excludes any "guaranty . . . executed in connection with the indebtedness" from the meaning of "related documents" and therefore excludes any guaranty from the scope of the deed of trust itself.

Defendants acknowledge that the term "related documents" is inconsistently defined between the instruments, but argue that "[t]he drafter who filled in the blank as to

what the Deed of Trust secured specifically elected to use the Construction Loan Agreement definition as opposed to the Deed of Trust definition." The deed of trust contradicts defendants' assertion. Under "Definitions," it provides: "The following capitalized words and terms shall have the following meanings when used in this Deed of Trust" and proceeds to define certain terms, including "related documents." "The cardinal requirement in the construction of deeds and other contracts is that the intention of the parties as gathered from the four corners of the instrument must govern." (*Machado v. Southern Pacific Transportation Co.* (1991) 233 Cal.App.3d 347, 352.) Under the deed of trust's own definitions clause and applying basic principles of contract interpretation, words and phrases defined within the deed of trust must control how it is to be interpreted.[4] Defendants ask us to place inordinate significance on the word "therein" while simultaneously ignore straightforward provisions that say the deed of trust is given to secure the "trustor's" obligations and excludes any guaranty executed in connection with the trustor's indebtedness. We decline to take up this strained reading of the contract.

Defendants also contend their guaranties were *indirectly* secured by the deed of trust because a guaranty default would result in a construction loan default, which in turn would trigger the Bank's right to foreclose on the deed of trust. They rely on the "default" provision in the construction loan agreement, which states in part that if "[a]ny of the preceding events" that would trigger a default on the part of the Borrower "occurs with respect to any Guarantor," that would be sufficient for the Bank to foreclose on the

---

[4] Defendants also ignore that the construction loan agreement contains a similar definitions provision: "The following capitalized words and terms shall have the following meanings when used in this Agreement." We are not at liberty to ignore these definitional provisions, which require the meaning of words and phrases within the four corners of a contract to apply specifically to that contract. We agree with the Bank that defendants are excising and combining provisions from two separate contracts to create new terms that do not reflect the mutual intent of the parties.

deed of trust. Defendants conclude: "The essence of an obligation being secured by a deed of trust is the secured party's ability to foreclose the deed of trust in order to compel performance of the secured obligation."

Having failed to persuade that the deed of trust expressly secures defendants' guaranty obligations, defendants' 'indirect' theory fares no better. Courts must avoid contractual interpretations that would create absurd or unreasonable results. (Civ. Code, § 1638.) It would be highly anomalous for the parties to manifest their desire to exclude any guaranty from the scope of the deed of trust itself, only to permit it to secure the guaranty obligations of a person (or entity) who is not the trustor or even a party to the deed of trust. Such a reading runs counter to the general principle that, in interpreting a contract "[a]n implication . . . should not be made when the contrary is indicated in clear and express words." (Corbin on Contracts (1960) § 564, p. 298.)

In any event, even if the Bank has the right to foreclose on the deed of trust based on a default of defendants' guaranties, such foreclosure would not relieve defendants of their independent contractual obligation as guarantors. Defendants' guaranty agreements with the Bank—the only agreements signed by defendants in this matter—expressly state in identical terms: "Guarantor further understands and agrees that this Guaranty is a separate and independent contract between Guarantor and Lender, given for full and ample consideration, and is enforceable on its own terms." This contractual provision is consistent with settled law that "[a] guaranty is a separate and independent obligation from . . . the principal debt." (*United Central Bank v. Superior Court* (2009) 179 Cal.App.4th 212, 215; see *Gray1 CPB, supra*, 202 Cal.App.4th at p. 489 ["A creditor may seek a personal judgment against any guarantor 'since a guaranty is an obligation separate and independent from that binding the principal debtor.' "].)

It is noteworthy that defendants' guaranty agreements do not mention anywhere that they are secured by the deed of trust. On the contrary, the guaranty agreements spell out the very scenario before this court: "Guarantor waives all rights and defenses that

Guarantor may have because Borrower's obligation is secured by real property. . . . [A]mong other things[,] . . . [*i*]*f Lender forecloses on any real property collateral[ly] pledged by Borrower*[,] . . . *Lender may collect from Guarantor* even if Lender, by foreclosing on the real property collateral, has destroyed any right Guarantor may have to collect from Borrower." (Italics added.) The guaranty also provides that "Lender may collect from Guarantor without first foreclosing on any real or personal property collateral pledged by Borrower" and "Lender can enforce this Guaranty against Guarantor even when Lender has not exhausted Lender's remedies against anyone else obligated to pay the indebtedness or against any collateral securing the indebtedness . . . ." These provisions are further evidence that the parties mutually intended that defendants' guaranties were to be separate, fully enforceable obligations—and not tied to any remedies the Bank may pursue against the borrower Folsom.

We conclude, based on the deed of trust and other written instruments in the record, that the parties mutually intended to secure the indebtedness and other performance obligations of the trustor Folsom only, and that defendants' guaranties are separately enforceable obligations, unsecured by the deed of trust.

III. The Bank's Collection Effort Is Not Barred by the One-form-of-action Rule

Because we conclude that defendants' guaranties are not secured by a deed of trust, the one-form-of action rule is not available to them. [5]

---

[5] As noted above, defendants' guaranty agreements incorporated several waivers, including a waiver of "all rights and any defenses that Guarantor may have because Borrower's obligation is secured by real property," which includes "any rights and defenses based upon Section 580a, 580b, 580d, or 726 of the Code of Civil Procedure." Because we conclude the one-form-of-action rule does not apply here, we need not address the Bank's arguments concerning the effect of these waivers. We observe, however, that such waivers are ordinarily enforceable. (Civ. Code, § 2856; *CADC/RADC Venture 2011-1 LLC v. Bradley* (2015) 235 Cal.App.4th 775, 793 [guarantor's waiver of "antideficiency protections, including the protections embodied in the one-action rule . . . [is] valid and enforceable"]; *Gray1 CPB*, *supra*, 202 Cal.App.4th at p. 491 [unconditional

The one-form-of action rule, codified under section 726, subdivision (a), provides in relevant part, "There can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property . . . in accordance with the provisions of this chapter." Section 726, subdivision (a), operates to prevent a secured creditor from bringing more than one lawsuit to enforce a security interest and collect his or her debt. (*Security Pacific National Bank v. Wozab* (1990) 51 Cal.3d 991, 997 (*Wozab*).)

Section 726 is part of a broader statutory scheme that restricts a creditor's right to enforce a debt secured by a mortgage or deed of trust on real property. (*Walker v. Community Bank* (1974) 10 Cal.3d 729, 733.) The law requires the creditor to rely on his security before enforcing the debt. (*Ibid*.) As construed by case law, section 726 is both a "one action" and a "security first" rule. It compels the secured creditor, in a single action, to exhaust the security before obtaining a monetary deficiency judgment. (*Ziello v. Superior Court* (1995) 36 Cal.App.4th 321, 330.) Where the creditor sues on the obligation and seeks a personal money judgment against the debtor before exhausting the security, the creditor makes an election of remedies. The creditor elects the single remedy of a personal action and thereby waives the right to foreclose on the security or to sell the security under a power of sale. (*Walker*, at p. 733.)[6]

Defendants cannot obtain the protections of the one-form-of-action rule because they are not the borrower—Folsom was—and because, as detailed above, their guaranty obligations are not secured by a mortgage or deed of trust. (§ 726, subd. (a) [requiring a

---

and exhaustive waivers of guarantor's rights or defenses under California surety statutes and antideficiency legislation "have withstood challenge and are enforceable"].)

[6] Section 726 serves two fundamental purposes. It prevents a multiplicity of lawsuits against the debtor and it requires the creditor to exhaust the security before resorting to the debtor's unencumbered assets. (*Wozab*, *supra*, 51 Cal.3d at p. 1005.) Thus, the rule is violated when a creditor seeks nonsecured assets from a debtor before foreclosing on the secured assets. (*Walker*, *supra*, 10 Cal.3d at pp. 740–741.)).

"right secured by mortgage upon real property"].) An action for breach of a guaranty is "not for the collection of the principal debt, as such, and is in fact independent of any action upon the principal obligation." (*Ingalls v. Bell* (1941) 43 Cal.App.2d 356, 368.)

The one-form-of action rule is inapplicable here for a third reason: a nonjudicial foreclosure is not considered an "action" within the meaning of section 726; "hence, a nonjudicial foreclosure does not violate section 726." (*Birman v. Loeb* (1998) 64 Cal.App.4th 502, 509.)[7]

DISPOSITION

We conclude defendants have failed to establish a complete defense to the Bank's motion for summary judgment. The summary judgment is affirmed.

[7] Defendants' reliance on an unciteable case, *First California Bank v. McDonald* (2014) 230 Cal.App.4th 1202 (mod. & superseded by *First California Bank v. McDonald* (2014) 231 Cal.App.4th 550, review granted Feb. 25, 2015, S222858, dism. & remanded Mar. 9, 2016), is contrary to California Rules of Court, rule 8.1115(e) and will not be considered.

_____
Sanchez, J.

WE CONCUR:

_____
Humes, P. J.

_____
Margulies, J.